

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY FRANCIS SCHOHL,

Defendant-Appellant.

UNPUBLISHED

October 8, 1999

No. 194717

Macomb Circuit Court

LC No. 95-002712 FH

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of fourth-degree criminal sexual conduct, MCL 750.520e(1)(c); MSA 28.788(5)(1)(c), and furnishing alcohol to a minor, MCL 436.33(1); MSA 18.1004. He was sentenced to two years' probation with the first six months to be served in the Macomb County Jail, and appeals as of right. We affirm.¹

Defendant contends that there was insufficient evidence to support his conviction for fourth-degree criminal sexual conduct, MCL 750.520e(1)(c); MSA 28.788(5)(1)(c). We disagree. "In reviewing the sufficiency of the evidence presented at trial in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In order to establish fourth-degree criminal sexual conduct, the prosecutor had to prove that defendant intentionally engaged in sexual contact with the victim for sexual purposes while defendant knew that the victim was physically helpless. CJI2d 20.13; CJI2d 20.16; MCL 750.520e(1)(c); MSA 28.788(5)(1)(c). In the present case, defendant does not contest the victim's allegations of sexual contact by the touching of her buttocks, but rather, challenges the victim's ability to identify defendant as her assailant. The victim testified that she woke up when she felt "him touching" her buttocks. However, the victim admitted that when she woke up, she could not see anything. The next thing she felt was an object, believed to be a penis, on her mouth. She also admitted that, *at that time*, she could not see defendant because it was dark. The victim turned her head away. She could feel her arm being manipulated when the dog began to bark. At this time, defendant jumped and ran away. The

victim testified that, at that time, she could see defendant. Additionally, on re-direct examination, the victim testified that defendant was the only person in the home who could have physically committed the crime due to his size.

Defendant also contends that the victim's testimony failed to establish that the object which touched her mouth was defendant's penis. During direct examination, the victim testified that she thought she "felt" a penis which touched her mouth, although she admitted that it was dark. She also described the penis as feeling "soft and wet." During cross-examination, the victim admitted that she told a police officer that she was not sure what the object was which touched her mouth. However, the victim also testified that when she returned from vacation, she had determined that it was defendant's penis. Viewing the evidence in the light most favorable to the prosecution, a rational factfinder could conclude that it was defendant who touched the victim's buttocks with his hand and touched her mouth with his penis. There was sufficient evidence to support defendant's fourth-degree criminal sexual conduct conviction. *Terry, supra*.

Defendant contends that the trial court erred in failing to provide a specific unanimity instruction to the jury. We disagree. In *People v Yarger*, 193 Mich App 532, 533; 485 NW2d 119 (1992), the defendant was charged with a single count of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The victim testified that in the fall of 1985, she was fifteen years of age when she consensually performed fellatio on the defendant. The defendant then penetrated her vagina with his penis. The trial testimony differed from the victim's preliminary examination testimony at which she stated that the defendant's penis never entered her vagina. The victim was impeached by her contradictions in testimony as well as prior false accusations of rape. The defendant denied that any act of sexual penetration occurred. *Id.*

The trial court in *Yarger* instructed the jury that either one of the two sexual acts, fellatio or vaginal intercourse, would satisfy the first element of the statute. The trial court went on to instruct the jury that their verdict must be unanimous as all twelve jurors had to agree on the verdict. The jury returned a guilty verdict. Although polled, the jurors were not asked to indicate which sexual act was proven beyond a reasonable doubt. On appeal, the defendant claimed that the jury instructions, although not objected to, were insufficient to satisfy the requirement that his conviction was the result of a unanimous verdict. This Court agreed and reversed the conviction, stating:

The complainant's trial testimony, if accepted as true, would have supported two separate convictions of third-degree criminal sexual conduct, each based on a separate sexual penetration. The jury instructions allowed the jury to convict defendant on the single sexual penetration charge if it believed that the evidence proved either penetration, or both, beyond a reasonable doubt. While we find nothing objectionable in the instruction itself, because only a single count of third-degree criminal sexual conduct was submitted to the jury, error occurred when the jury was not instructed that it must unanimously agree on *which* act(s) was proven beyond a reasonable doubt. In other words, a possibility exists, that for example, six jurors were convinced that fellatio had occurred, but not intercourse, while the other six jurors held the opposite view. Unless waived by a defendant, the right to a jury trial includes the right to a unanimous

verdict. In this case, we find it impossible to discern of which act of penetration defendant was found guilty. . . . We now conclude that the error requires that defendant's conviction be reversed. If this case is retried, defendant should either be charged with two separate counts of third-degree criminal sexual conduct or else an appropriate instruction should be given to the jury. [*Yarger, supra* at 536-537 (citations omitted; emphasis in original).]

However, the Supreme Court examined the *Yarger* decision in *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994), and distinguished the facts to reach the opposite conclusion. In *Cooks*, the ten-year-old victim testified that the defendant engaged in three acts of nonconsensual anal intercourse with her during a one-week period. At trial, the defendant requested a special instruction to the jury requiring them to unanimously agree on the specific act of penetration which occurred. The trial court declined to do so, giving only the general unanimity instruction. *Cooks, supra* at 506-509.

The *Cooks* Court examined the law from state and federal jurisdictions before holding:

. . . if alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*Cooks, supra* at 524.]

In *Yarger*, the victim testified that she consensually performed fellatio on the defendant. She then testified that the fellatio was followed by vaginal intercourse. However, the defendant went on to impeach the victim's testimony as she had previously made false accusations of rape. The victim was also impeached with her prior testimony at the preliminary examination at which she denied that the defendant's penis entered her vagina. As the convictions focused on the credibility of the victim and the defendant, the jury could have reached a verdict without concluding unanimously which sexual act, fellatio or vaginal intercourse, occurred. *Yarger, supra* at 537.

However, the *Cooks* Court concluded that:

. . . the evidence offered in this case to support each of the alleged acts of penetration was materially identical, i.e., the complainant's equivocal testimony of an anal penetration, occurring in the same house over an unspecified three-day period in January 1989, while only she and defendant were in the room. Thus, the multiple acts alleged by the prosecutor were tantamount to a continuous course of conduct. . . . [D]efendant here did not present a separate defense or offer materially distinct evidence of impeachment regarding any particular act. He merely denied the existence of any inappropriate behavior. Thus, the sole task of the jury was to determine the credibility of the victim with respect to the pattern of alleged conduct. Because neither party presented materially distinct proofs regarding any of the alleged acts, the factual basis

for the specific unanimity instruction mandated in *Yarger* . . . was nonexistent. [*Cooks, supra* at 528-529.]

In the present case, the victim testified that she was asleep when she felt defendant touching her buttocks. The next act which occurred was the placement of defendant's penis on her mouth. The trial court did not provide a specific unanimity instruction, but gave the general instruction. The evidence offered in support of the fourth-degree criminal sexual conduct charge was materially identical, namely both acts were testified to by the victim as occurring within the same location, the living room area of defendant's residence, within a short span of time. Therefore, the multiple acts could be deemed to be a continuous course of conduct. Defendant did not offer separate defenses to each individual sexual act, but rather, categorically denied the allegations of inappropriate touching of the buttocks and mouth. Accordingly, the jury assessed the credibility of Nicole and defendant where the proofs and defenses were the same. Pursuant to *Cooks, supra* at 536-537, reversal is not required as the general instruction to the jury did not deprive defendant of his right to a unanimous verdict.

Defendant next argues that various statements made in the prosecutor's closing argument deprived him of a fair trial. "Failure to object during trial precludes appellate review of alleged prejudicial remarks by the prosecutor unless the prejudicial effect would not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice." *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). We find that the prosecutor's comments were not prejudicial. In any event, defendant has failed to demonstrate that the prosecutor's comments could not have been cured by an appropriate instruction. *Id.*

Defendant also argues that the prosecutor improperly elicited testimony regarding defendant's exercise of his right to remain silent. We disagree. The prosecutor questioned a police officer regarding contact with defendant. Although the question posed required a "yes" or "no" response, the officer testified that defendant did not return any additional telephone calls. There was no evidence that the prosecutor elicited the answer in a studied attempt to place the issue before the jury. The prosecutor did not reference defendant's failure to return telephone calls in closing argument. Accordingly, defendant was not denied a fair trial. *People v Truong*, 218 Mich App 325, 335-336; 553 NW2d 692 (1996).

Defendant also asserts that he was denied a fair trial by the admission of a prior consistent statement by the victim. We disagree. The testimony was not objected to and was cumulative to the victim's testimony. Accordingly, any error was harmless. *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

Lastly, defendant asserts that he was denied the effective assistance of counsel. There is a presumption in favor of effective assistance, and a defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Id.* The alleged deficiency must be prejudicial to the defendant, and the defendant must overcome the

presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich

App 47, 53; 523 NW2d 830 (1994). In the present case, defendant failed to meet his burden in demonstrating ineffective assistance of counsel.

Affirmed.

/s/ Helene N. White

/s/ Harold Hood

/s/ Kathleen Jansen

¹ The trial court imposed the sentence of two years' probation with the first six months to be served in the Macomb County Jail, but was interrupted before it could specify the conviction to which this sentence applied. The sentencing document provides that this sentence was imposed for the fourth-degree criminal sexual conduct conviction. The document also provides that defendant was sentenced to ninety days in jail for the furnishing alcohol to a minor conviction, to be served concurrently to the fourth-degree criminal sexual conduct conviction.